

MANDATE

13-0118
United States v. Katsman

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 13th day of January, two thousand fourteen.

PRESENT: DENNIS JACOBS,
RAYMOND J. LOHIER, JR.,
CHRISTOPHER F. DRONEY,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

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13-0118

IGOR KATSMAN,
Defendant-Appellant.

FOR APPELLANT: JONATHAN I. EDELSTEIN, Edelstein & Grossman, New York, New York

FOR APPELLEE: MICHAEL H. WARREN, for Loretta E. Lynch, United States Attorney for the Eastern District of New York, Brooklyn, New York.

1 Appeal from a judgment of the United States District
2 Court for the Eastern District of New York (Johnson, J.).
3

4 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED**
5 **AND DECREED** that the judgment of the district court be
6 **AFFIRMED**.

7 Katsman appeals from the judgment of the United States
8 District Court for the Eastern District of New York
9 (Johnson, J.), convicting him of conspiracy to defraud the
10 Internal Revenue Service in violation of 18 U.S.C. § 371
11 (two counts) and aggravated identity fraud in violation of
12 18 U.S.C. § 1028A. On appeal, Katsman challenges the 120
13 month sentence as procedurally erroneous and substantively
14 unreasonable. We assume the parties' familiarity with the
15 underlying facts, the procedural history, and the issues
16 presented for review.

18 **1. Organizer-Leader Enhancement**

19 The offense level may be enhanced for an "organizer or
20 leader of a criminal activity that involved five or more
21 participants or was otherwise extensive." U.S.S.G. § 3B1.1
22 (2012). "[T]he sentencing court's findings of fact as to a
23 defendant's role in the offense will be overturned only if
24 they are clearly erroneous. The district court's conclusion
25 that [a defendant is] a manager, supervisor, organizer, or
26 leader, for purposes of U.S.S.G. § 3B1.1(a), however,
27 involves a legal interpretation of the Guidelines and is

1 reviewed *de novo*." United States v. Wisniewski, 121 F.3d
2 54, 57-58 (2d Cir. 1997) (internal quotation marks and
3 citations omitted).¹

4 Katsman argues that the district court improperly
5 conflated his essential role in the conspiracy with being
6 its leader, and that he did not direct the actions of his
7 "clientele." This enhancement entails the following
8 considerations:

9 the exercise of decision making authority, the nature
10 of participation in the commission of the offense, the
11 recruitment of accomplices, the claimed right to a
12 larger share of the fruits of the crime, the degree of
13 participation in planning or organizing the offense,
14 the nature and scope of the illegal activity, and the
15 degree of control and authority exercised over others.

16
17 U.S.S.G. § 3B1.1 cmt. 4; see United States v. Beaulieu, 959
18 F.2d 375, 379-80 (2d Cir. 1992). Katsman played an
19 instrumental role by providing his partners the checks to be
20 cashed, directing at least one individual to delay filing a
21 currency transaction report, purchasing the identification
22 documents, and instructing his partners to assign each shell
23 company to a particular client to lessen the risk of
24 exposure. Given the scope of the offense to commit tax

¹ The district court adopted the facts recited in the presentence report. Where a presentence report states enough facts for meaningful appellate review, a district court may thus satisfy its obligation to make factual findings. See United States v. Skys, 637 F.3d 146, 157 (2d Cir. 2011).

1 fraud, the nature of Katsman's necessary facilitation, and
2 his direction over his partners, we find no error in the
3 district court's application of the organizer-leader
4 enhancement.

5 To the extent Katsman argues that the four-level
6 enhancement overstates the size of his criminal enterprise,
7 the presentence report identifies eight medical supply
8 companies involved in the conspiracy. While Katsman rightly
9 argues that an ordinary customer-vendor relationship does
10 not establish a conspiracy, see United States v. Hawkins,
11 547 F.3d 66, 72 (2d Cir. 2008), there was sufficient
12 evidence in this case of a conspiracy. Indeed, Katsman pled
13 guilty to two conspiracy charges.

14 **2. Government's Release From the Plea Agreement**

15 When interpreting a plea agreement, "courts construe
16 plea agreements strictly against the Government." United
17 States v. Ready, 82 F.3d 551, 559 (2d Cir. 1996), superseded
18 on other grounds as stated in United States v. Cook, 722
19 F.3d 477, 481 (2d Cir. 2013). Furthermore, "courts may
20 apply general fairness principles to invalidate particular
21 terms of a plea agreement." Id. In the plea agreement, the
22 Government agreed not to advocate for a position within the
23 acknowledged Guidelines range in the absence of any
24 subsequent information relevant to sentencing. Katsman

1 contends that these principles of interpretation require us
2 to hold that the relevant information must be material and
3 significant. Even if we accept this argument, Katsman's
4 creation of a Facebook page to denounce a cooperating
5 witness was material and significant, at least insofar as it
6 demonstrates Katsman's character and even the extent to
7 which he is accepting responsibility. Regardless of truth,
8 publicizing the cooperation of another person in the
9 criminal process can have serious consequences. No case
10 supports the argument that a fact is material only if it
11 shows a criminal offense or the factual predicate of a
12 sentencing enhancement.

13 **3. Vindictiveness**

14 Katsman argues that the increase in sentence at
15 resentencing was presumptively vindictive in light of North
16 Carolina v. Pearce, 395 U.S. 711, 725-26 (1969). However,
17 "before a defendant may invoke the Pearce presumption, there
18 must be a 'reasonable likelihood that the increase in
19 sentence is the product of *actual vindictiveness* on the part
20 of the sentencing authority.'" United States v. Singletary,
21 458 F.3d 72, 76 (2d Cir. 2006) (quoting Alabama v. Smith,
22 490 U.S. 794, 799 (1989)) (emphasis in Singletary). Katsman
23 cannot show such a reasonable likelihood. His resentencing
24 was conducted by a different district judge, the

1 resentencing was not the result of a successful appeal, and
2 the resentencing judge was aware of Katsman's conduct on
3 Facebook and the Government's request to add the organizer-
4 leader enhancement.

5 **4. Substantive Unreasonableness**

6 Substantive reasonableness is reviewed for abuse of
7 discretion. United States v. Leslie, 658 F.3d 140, 142 (2d
8 Cir. 2011). Katsman played a crucial role in this
9 conspiracy. Furthermore, the district court appropriately
10 considered Katsman to be an organizer in the scheme and knew
11 of Katsman's later conduct on Facebook. Part of Katsman's
12 sentence--24 months--was also mandatory as a result of the
13 identity fraud charge. 18 U.S.C. § 1028A(a)(1); (b)(2).
14 Furthermore, the sentence was within the Guidelines range.
15 The district court did not abuse its discretion in imposing
16 this sentence.

17
18 For the foregoing reasons, and finding no merit in
19 Katsman's other arguments, we hereby **AFFIRM** the judgment of
20 the district court.

21
22 FOR THE COURT:
23 CATHERINE O'HAGAN WOLFE, CLERK
24


Catherine O'Hagan Wolfe

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit




Catherine O'Hagan Wolfe